STATE OF MICHIGAN

COURT OF APPEALS

ALONZO MORGAN and DONITA MORGAN, Plaintiffs-Appellants,	UNPUBLISHED January 17, 2008
v	No. 276119 Oakland Circuit Court
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC, Defendant-Appellee.	LC No. 2005-070261-CK

Before: Davis, P.J., and Murphy and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendants and from the trial court's subsequent denial of reconsideration. This case arises out of a second mortgage[1] plaintiffs obtained on their home on October 20, 2003, with defendant as the mortgagee. Plaintiffs fell into arrears on both mortgages, but apparently successfully refinanced the first. Defendant foreclosed on the second mortgage by advertisement, MCL 600.3208, and a sheriff's sale was held on March 8, 2005. Defendant was the high bidder at the sale, and after plaintiffs failed to redeem the property, defendant commenced eviction proceedings in district court. Plaintiffs contended that the foreclosure had been improper because they did not receive the required statutory notice, and they commenced the instant action challenging that foreclosure. The parties engaged in some settlement negotiations, but no settlement agreement was entered. The trial court granted defendant's motion for summary disposition and subsequently denied reconsideration. This appeal followed. We affirm.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all evidence submitted by the parties in the light most favorable to the nonmoving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 120. The standard under MCR 2.116(C)(10) is not whether it is impossible for a claim to be

[1] The first mortgage is not at issue in this case.

supported by evidence presented at a trial, but rather whether the party opposing the motion has actually provided substantively admissible evidence showing that a genuine dispute over material facts exists. *Id*., 120-121. In contrast, a motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the nonmoving party. *Id*., 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*., 119-120.

We likewise review de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175, amended on other grounds 468 Mich 1216 (2003). The goal of statutory interpretation is to determine and give effect to the intent of the Legislature, with the presumption that unambiguous language should be enforced as written. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). If the language is unambiguous, "the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159-160; 645 NW2d 643 (2002), citing *Turner v Auto Club Ins Ass'n*, 448 Mich 22; 528 NW2d 681 (1995).

At issue in this case is the propriety of defendant's foreclosure by advertisement. The right to foreclose by advertisement was contained in the mortgage instrument as agreed to and executed by the parties to this transaction.

"Foreclosure by advertisement is controlled by statute," and although the mortgagee employing that method must strictly comply with the pertinent statutory requirements, the mortgagor is "not entitled to any greater notice than that required by the statute involved." *Cheff v Edwards*, 203 Mich App 557, 560; 513 NW2d 439 (1994). MCL 600.3208 provides as follows:

> Notice that the mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated. If no newspaper is published in the county, the notice shall be published in a newspaper published in an adjacent county. In every case within 15 days after the first publication of the notice, a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice.

Significantly, "personal service is not required by the statute; instead, publication in a newspaper for four consecutive weeks and a posting of the foreclosure notice on the premises is all that is required." *Cheff*, *supra* at 561. It is immaterial that the mortgagor does not receive *actual* notice. See *Robulus v American State Bank*, 258 Mich 21, 22; 241 NW 831 (1932).

Plaintiffs primarily argue that defendant did not comply with MCL 600.3208 because plaintiffs did not receive actual notice of the sale. This argument is without merit. The record shows that plaintiffs were actually aware that their mortgage was in arrears, and defendant advised plaintiffs in writing a month previously that a sheriff's sale was scheduled for March 8, 2005. Attached to the sheriff's deed is a newspaper notice of the sheriff's sale and an affidavit

stating that it was published in the Oakland County Legal News on February 4, 11, 18, and 25, and on March 4, 2005. Also attached is an affidavit stating that a copy of the same notice had been attached on February 10, 2005, to "the wood above doorbell" on the subject property itself. Defendants facially complied with the notice requirements of MCL 600.3208, and nothing further was required of them. As noted, plaintiffs had additionally been given advanced warning of the impending sale.

Plaintiffs' alternative argument is that they did not see any notice posted on their property, which they contend raises a question of fact whether the notice was, in fact, posted. We note that plaintiffs' affidavits clearly indicate that they would not have been present when the notice was posted, so they cannot have personal knowledge of whether it was; furthermore, failing to see something does not necessarily mean there is nothing to see. The service here was facially proper. Service facially made by a private person is more readily open to attack than service facially made by an officer.[2] See *Stork v Michaels*, 52 Mich 260, 264-266; 17 NW 833 (1883); *Detroit Free Press Co v Bagg*, 78 Mich 650, 653; 44 NW 149 (1889); *Campbell v Donovan*, 111 Mich 247, 250; 69 NW 514 (1896). Nevertheless, any facially proper service requires a considerable showing of proof before it may be set aside, and courts generally consider a bare denial of service insufficient. *Delph v Smith*, 354 Mich 12, 16-18; 91 NW2d 854 (1958). A bare denial of service is all plaintiffs allege here, which is particularly unavailing given that the notice required by statute need only be constructive, not actual.

The trial court correctly found that actual notice was not required under the method of foreclosure used by defendant. Although the trial court did not state on the record that plaintiffs' denial of actual service created a genuine issue of material fact as to whether defendant posted the required notice on plaintiffs' property, the trial court reached the right result.

Plaintiffs nevertheless challenge the trial court's denial of reconsideration, which we address because of plaintiff's claim that the parties had a settlement agreement that should have been enforced. A trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion. *In re Estate of Moukalled*, 269 Mich App 708, 713; 714 NW2d 400 (2006). The trial court does not abuse its discretion by denying a motion for reconsideration that presents facts or arguments that could have been pled or argued when the trial court was first presented with the issue. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). "The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

Plaintiffs argue that the trial court should have granted reconsideration because the parties had entered into a binding settlement agreement prior to the summary disposition hearing. If true, the courts would be required to enforce the settlement agreement, which in this case

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[2] It is not clear from anything in the record whether the "Jim Fleming" who averred that he posted notice on plaintiffs' property is an officer or a private person.

would mandate a result that differs significantly from the results of the order granting summary disposition. The record reflects that all parties did, in fact, sign the stipulation and order for judgment that defendant prepared and forwarded to plaintiffs. However, regarding their subsequent communications – or lack thereof – with each other, both parties make factual presentations that are not reflected in the record, so this Court may not consider them. *Bailey v De Graff*, 2 Doug 169 (1845); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). The record is also sufficiently complete for us to conclude that no contract was entered into.

On August 23, 2006, defendant sent plaintiffs a letter expressing defendant's decision to set aside the foreclosure sale and included a proposed stipulation and order for judgment to that effect. The letter also contained explicit, unambiguous instructions for plaintiffs to "review the stipulation, sign it and return it in the enclosed self-addressed envelope." Plaintiffs signed the stipulation, but they did not return it to defendant, as demonstrated by the fact that they attached the signed original to their motion for reconsideration. Although plaintiffs assert that they faxed a copy back to defendant, the only evidence in the record of a fax transmission is of an unsigned copy of the stipulation bearing handwritten alterations and no indication of whether those alterations were mere suggestions.

Plaintiffs correctly state that settlement agreements are contracts, so they are analyzed as contracts. *Kloian, supra* at 452. A settlement agreement therefore requires an offer, an unambiguous acceptance strictly conforming to the offer, and a meeting of the minds on all essential terms of the agreement. *Id*., 452-453. "An acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose." *Id*., 453-454 (citation omitted). Whether there was a meeting of the minds is determined by objective observation of parties' acts, not their subjective states of mind. *Id*., 454.

The record here fails to show that plaintiffs undertook an unequivocal act objectively communicating an intent to be bound by the offer. The letter from defendant in this case is less precise than the letter at issue in *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 638-641; 540 NW2d 777 (1995), where this Court held that explicit instructions to accept the contract by signing and returning it to the drafter precluded effective acceptance by any other means. Defendant's letter does not explicitly state, in those words, that plaintiffs must signify their acceptance by signing and returning the enclosed stipulation. Nevertheless, the instructions are clear enough that signing and mailing back the stipulation was to be the exclusive way for plaintiffs to accept the stipulation. Plaintiffs did not do so. More to the point, the record does not show that plaintiffs unequivocally communicated acceptance of the stipulation to defendant by any means.

Plaintiffs argue that the evidence shows that the parties intended to settle. Given that defendant made a similar offer again, even *after* entry of the order granting summary disposition,

this may be true.[3] Also, the mere fact that plaintiffs expressed unhappiness with some of the terms of the stipulation as defendant provided it to them does not preclude a nevertheless valid, if reluctant, acceptance. *Johnson v Federal Union Surety Co*, 187 Mich 454, 466-467; 153 NW 788 (1915). However, the parties' intent to form a contract is not enough, by itself, for there to *be* a contract, "and no presumption will be indulged in favor of the execution of a contract since, regardless of the equities in a case, the courts cannot make a contract for the parties when none exists." *Hammel v Foor*, 359 Mich 392, 399-400; 102 NW2d 196 (1960). Negotiations and discussions do not satisfy the formal requirement of acceptance for there to be a contract. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992). Based on the evidence in the record, plaintiffs have failed to prove that the parties mutually assented to a binding contract prior to the entry of the October 4, 2006 order granting summary disposition.

Plaintiffs also argue that the trial court improperly granted summary disposition because of plaintiffs' failure to appear for the summary disposition hearing. The transcript, however, clearly shows that the trial court granted summary disposition on the merits of the parties' arguments found in their pleadings, not on plaintiffs' absence. The trial court's result was, in any event, correct. Even if the trial court had been influenced by plaintiffs' absence, correction of that error would not mandate a different result. See MCR 2.119(F)(3).

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Helene N. White

[3] The parties again refer to facts not in the record regarding why the second stipulation was never signed, but it is agreed by both parties that plaintiffs ultimately refused to do so.